

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000285-001 DT

07/01/2005

HONORABLE MARK R. SANTANA

CLERK OF THE COURT
K. Wendroff
Deputy

FILED: _____

STATE OF ARIZONA

KENNETH M FLINT

v.

LARRY RICHARD PETERSEN (001)
SCOTTSDALE MUNICIPAL COURT (001)

CAMERON A MORGAN

REMAND DESK-LCA-CCC

MINUTE ENTRY

I. Jurisdiction

This Court has jurisdiction pursuant to Article VI, Section 14 of the Arizona Constitution.

II. Facts

Appellant (Petersen) was arrested for DUI on January 28, 2004. The trial was held on September 28, 2004. Before trial, defense counsel filed a motion in limine objecting to any hearsay statements regarding the training and experience of the individual who drew defendant's blood, an individual named "Adelle". The motion was granted. "Adelle" did not testify at trial.

At trial, one of the arresting officers testified concerning the blood draw. The officer testified that (1) the individual who drew the blood was named "Adelle"; (2) he had been employed by the City of Scottsdale for approximately four years and he had known her during that time period (3) he had seen her draw blood approximately twelve times and (4) she appeared to know how to draw blood.

Following this testimony, the State moved for the admission of the blood draw sample. The motion, which was not objected to by Petersen, was granted. Thereafter, the criminalist for the State testified that that he tested the blood sample and it established a blood alcohol content of .247. The jury convicted Petersen of DUI, having a BAC of .08 or above within two hours of driving and extreme DUI.

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Petersen timely appealed his conviction.

III. Analysis

A. Introduction

On appeal Petersen argues that his conviction should be overturned because the State failed to establish that his blood was drawn by a “qualified person” within the meaning of A.R.S. § 28-1388(A). The State contends that either Petersen waived his objection to the blood drawer’s qualifications or there is sufficient evidence in the record to prove that “Adelle” was a qualified person.

B. Did Petersen waive his objection to “Adelle”’s qualifications?

The State argues that Petersen waived his objection made in the motion in limine by indicating no objection to the admission of the blood test results when the State moved to admit that evidence. This Court finds, however, that the motion in limine sufficiently preserved Petersen’s objection. Because A.R.S. § 28-1388(A) provides that the qualifications of the individual withdrawing the blood are not foundational prerequisites to the admissibility of the blood alcohol determination, the Petersen may not have had any additional objections to the blood draw beyond the qualifications objection. Petersen did not have to repeat the objection to “Adelle”’s qualifications, an objection that had been properly raised in the motion in limine and which Petersen had not withdrawn.

C. Did the State prove that “Adelle” was a “qualified person” pursuant to A.R.S. § 28-1388(A).

A.R.S. § 28-1288(A) requires the State to present evidence that someone trained in blood withdrawal, a physician, nurse or other qualified person, actually draw the blood but does not require evidence of that person’s professional qualifications, credentials or the methods used to withdraw the blood. State v. Nihiser, 191 Ariz. 199, 953 P.2d 1252 (Ct. App. 1997). In this case, the only admissible evidence provided by the testifying officer indicated that the blood was drawn by an individual named “Adelle”, that he had seen her draw blood on approximately twelve occasions and that she appeared to know what she was doing. This evidence is simply insufficient to establish that person’s qualifications. The critical issue is whether there was evidence that the person was *trained* in blood withdrawal, and the officer could not offer an opinion on that issue. His testimony that “Adelle” appeared to know what she was doing and had withdrawn blood several times before is interesting, but does not prove that she was trained

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in blood withdrawal or has the qualifications to do so.¹ See Harden v. State, 210 Ga. App. 673, 675, 527 S.E.2d 552, 554 (1993)

The State contends that State v. Nihiser, supra, permits it to establish the statutory qualifications through the hearsay testimony of police officers who did not personally know of the qualifications of the blood drawer but observed the withdrawal. But in Nihiser, the officers testified that the draw was conducted by an individual at a hospital, that the person was a member of the hospital staff and that he had a name tag that identified him as a physician. 191 Ariz. at 203, 953 P.2d at 1256. The Court of Appeals found that the testimony established that the blood draw was at a hospital and that hospitals are presumed not to hire unqualified staff. Id. at 203, 953 P.2d at 1256. In this matter, the draw was conducted at a jail; no such presumption exists. Moreover, there was no other evidence to suggest “Adelle” was a qualified person.

The State did not establish that the blood was drawn by a qualified person pursuant to A.R.S. § 28-1388(A).

D. Conclusion

The court concludes that Petersen did not waive his objection to “Adelle’s” qualifications. The court further determines that the State did not prove that “Adelle” was a qualified person under A.R.S. § 28-1388(A).

Petersen is entitled to a new trial, but only as to the issue of “Adelle”’s qualifications. He did not otherwise raise any valid objections to the admissibility of the blood alcohol content determination. This Court will direct that the trial court hold an evidentiary hearing on “Adelle’s” qualifications. If the State provides admissible evidence that “Adelle” was a qualified person pursuant to A.R.S. § 28-1388(A), the conviction is affirmed. If the State is unable to prove that “Adelle” was a qualified person, the judgment is to be vacated and a judgment of acquittal entered as to the A.R.S. § 28-1381(A)(2) and extreme DUI charges. A new jury trial is also to be conducted on the A.R.S. § 28-1381(A)(1) charge.

IT IS ORDERED:

- (1) Reversing the trial court on the issue of whether the blood draw was performed by a qualified person pursuant to A.R.S. § 28-1288(A);
- (2) Ordering a new trial on the issue of whether the blood draw was performed by a qualified person pursuant to A.R.S. § 28-1288(A);

¹ The State argues that the evidence establishes that “Adelle” was experienced and therefore met the requirements of A.R.S. § 28-1388(A). But the statute focuses on qualifications and requires evidence that the person has some type of credential beyond “on the job” training. See State v. Carasco, 203 Ariz. 44, 49 P.2d 140 (Ct App. 2002). If the qualifications standard is whether someone has drawn blood on more than one occasion, even a dozen, the qualifications requirement becomes subjective and meaningless.

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- (3) Upon a determination by the trial court as to whether the blood draw was performed by a qualified person pursuant to A.R.S. § 28-1288(A), that court shall take other appropriate action as set forth in this minute entry.